

1 marked as an exhibit with a cover sheet of  
2 Deposition A, which we have done over lunch.

3 JUDGE SIPPEL: Thank you very  
4 much.

5 MR. CARROLL: For identification  
6 this is labeled Comcast Exhibit 719.

7 JUDGE SIPPEL: Comcast 719.

8 (Whereupon the aforementioned  
9 document was marked for  
10 identification as Comcast Exhibit  
11 No. 719.)

12 MR. CARROLL: May I distribute to  
13 you and to my colleagues on the other side?

14 JUDGE SIPPEL: Please do.

15 MR. CARROLL: Thank you.

16 JUDGE SIPPEL: Thank you.

17 Do you have any extra copies for  
18 my staff here?

19 MR. CARROLL: I do indeed.

20 JUDGE SIPPEL: Thank you.

21 MR. CARROLL: And Your Honor had  
22 asked about whether we should pull out the

1 pages from the transcript of Mr. Hawkins,  
2 which was Tuesday. And I had indicated that  
3 I thought we were finished the redaction. The  
4 NFL has advised me they are finished the  
5 redaction, and the transcript is on its way  
6 over here. So I think we can just rely on  
7 that unless Your Honor wants to do something  
8 different.

9               JUDGE SIPPEL: No, you're  
10 absolutely right. That will be fine. We have  
11 enough paper, and anyway the reference is well  
12 made as to what that was, and I put that into  
13 a different context, in the deposition. But  
14 there is no record of the deposition except  
15 the deposition.

16              So anyway, Comcast Exhibit 719 is  
17 identified as Mr. Carroll stated, and is there  
18 any objection to its receipt into evidence?

19              MR. SCHMIDT: No, Your Honor.

20              JUDGE SIPPEL: There being none,  
21 it is received into evidence as Comcast No.  
22 719.

1           (Whereupon the aforementioned  
2           document having been previously  
3           marked for identification as  
4           Comcast Exhibit No. 719 was  
5           received into evidence.)

6           JUDGE SIPPEL:   Now, Mr. Toscano,  
7 you may proceed.

8           MR. TOSCANO:   And we have a copy  
9 of his direct written. May I hand that up?

10          JUDGE SIPPEL:   Please do.

11 Whereupon,

12 JONATHAN ORSZAG

13 was called as a witness by counsel for Comcast  
14 and, after having been first duly sworn, was  
15 examined and testified as follows:

16          MR. SCHMIDT:   Your Honor, before  
17 we get started, I don't know if Mr. Toscano  
18 intends to elicit highly confidential  
19 information from Mr. Orszag. We certainly do  
20 in our cross.

21          JUDGE SIPPEL:   Well, how is he on  
22 direct? Is it pretty clean?

1 MR. TOSCANO: It's pretty clean.

2 We have one chart with highly confidential  
3 information, and if you just do that as a  
4 handout, and not put up the chart.

5 JUDGE SIPPEL: All right, let's  
6 see how far we can get with this. All right.  
7 Okay, Mr. Toscano, you may proceed.

8 DIRECT EXAMINATION BY COUNSEL FOR COMCAST

9 BY MR. TOSCANO:

10 Q Good afternoon, Mr. Orszag.

11 A Good afternoon.

12 Q Could you briefly describe your  
13 professional background?

14 A Sure. I started my career in  
15 government service, first at the office of the  
16 chief economist of the Department of Labor,  
17 and then moved over to the White House  
18 National Economic Council under Bill Clinton.

19 And then I served as the director  
20 of the Office of Policy and Strategic Planning  
21 at the Department of Commerce. And in that  
22 role I was deeply involved in

1 telecommunications policy issues, because the  
2 Department of Commerce is the administration's  
3 representative to the FCC.

4           After leaving government I formed  
5 an economic consulting firm focused on  
6 competition issues, regulatory issues, public  
7 policy issues, with my brother, Peter. In the  
8 past nine years or so, I've remained involved  
9 in public policy issues. I served as a senior  
10 fellow at a think tank here in Washington,  
11 D.C., and have had other roles in public  
12 policy since then.

13           I have also been involved in  
14 telecommunications issues, mergers, regulatory  
15 proceedings, here at the FCC, and I'm a fellow  
16 at the Center for Communications Law and  
17 Policy at USC which was started by former FCC  
18 chief economist Simon Wilkie.

19           And I have been involved in a  
20 number of sports economics issues over the  
21 past nine years.

22           Q       And you have put in extensive

1 written testimony. Would you very briefly  
2 summarize your principal opinions?

3       A       I have three principal opinions.  
4 First, that there is no reliable evidence of  
5 discrimination based on affiliation; and that  
6 when one considers discrimination, one must  
7 consider issues of price and value.

8               Second, Comcast has not harmed the  
9 NFL Network's ability to compete.

10              And third, there has been no harm  
11 to competition.

12       Q       Mr. Orszag, have you reviewed Dr.  
13 Singer's written testimony?

14       A       Yes, I have.

15       Q       And you listened to his live  
16 testimony?

17       A       Yes, I have.

18       Q       Do you have any opinions of his  
19 analysis and conclusions?

20       A       Well, first, none of the testimony  
21 that he submitted causes me to change my  
22 opinions. And second, he submitted what he

1 calls a fair market value analysis; what I  
2 prefer to call a Comcast price prediction  
3 analysis. And I view that as fundamentally  
4 flawed and producing unreliable results.

5       Q       I'd like to go back to your first  
6 principal opinion and ask, what is the basis  
7 for your opinion that there is no reliable  
8 evidence of discrimination based on  
9 affiliation?

10       A       From an economic perspective I  
11 walked through a lot of evidence in my written  
12 testimony, so I'll just try to summarize it.  
13 But the most direct and compelling evidence is  
14 looking at the behavior of the top MVPDs.

15               MR. TOSCANO:   Your Honor, I'd  
16 like to mark as an exhibit for identification.  
17 I'd like to have the witness identify it.

18               JUDGE SIPPEL:   Why don't we get  
19 this transcript in first. This is Comcast  
20 Exhibit No. 24?

21               MR. TOSCANO:   Yes, and that is  
22 already in evidence.

1 JUDGE SIPPEL: It's already in as  
2 No. 24?

3 MR. TOSCANO: As 24.  
4 (Whereupon the aforementioned  
5 document was marked for  
6 identification as Comcast Exhibit  
7 No. 24.)

8 JUDGE SIPPEL: And this is for  
9 identification Comcast Exhibit 600?

10 MR. TOSCANO: Six hundred.

11 JUDGE SIPPEL: Would you explain  
12 what this document purports to be?

13 THE WITNESS: Sure. This is the  
14 penetration rate of the NFL network on the top  
15 MVPDs in 2008.

16 (Whereupon the aforementioned  
17 document was marked for  
18 identification as Comcast Exhibit  
19 No. 600.)

20 MR. SCHMIDT: Your Honor, I do  
21 want to raise a confidentiality concern. This  
22 document on its face is labeled highly



1 confidential by Comcast at the bottom. And  
2 I'm just not sure where Mr. Orszag is getting  
3 the data reflected in this chart. It comes  
4 from our documents. It's highly confidential.

5 THE WITNESS: It comes from in  
6 part your documents, but I won't mention any  
7 numbers. Is that fair?

8 JUDGE SIPPEL: For now, yes.  
9 Thank you.

10 MR. TOSCANO: And we'd move to  
11 admit Comcast Exhibit No. 600.

12 JUDGE SIPPEL: Is there any  
13 objection to that?

14 MR. SCHMIDT: No objection, Your  
15 Honor.

16 JUDGE SIPPEL: Okay, it's  
17 identified and received as Comcast 600.

18 (Whereupon the aforementioned  
19 document having been previously  
20 marked for identification as  
21 Comcast Exhibit No. 600 was  
22 received into evidence.)

1 BY MR. TOSCANO:

2 Q Mr. Orszag, what do you conclude  
3 from the data in this chart?

4 A Well, Comcast is in the heart of  
5 the top MVPDs in terms of its penetration rate  
6 that the NFL Network receives. And there are  
7 four that have higher penetration rate, and  
8 six that have a lower penetration rate than  
9 Comcast.

10 Q In your written testimony you  
11 focus on the decisions of other large cable  
12 companies. Why is that?

13 A There are a number of reasons, and  
14 let me start with DIRECTV and why I discount  
15 the relevance of their penetration.

16 The DIRECTV contract as we've  
17 heard is a bundled contract.

18 MR. SCHMIDT: Your Honor, again,  
19 I think here we are getting into confidential  
20 information. I apologize for jumping in. I  
21 think this is just a problem.

22 JUDGE SIPPEL: All right, you're

1 proper to raise it. Let's go off the record  
2 then.

3 (Whereupon at 1:10 p.m. the  
4 proceeding in the above-entitled  
5 matter went off the record to  
6 return on the record at 1:11 p.m.)

7 JUDGE SIPPEL: We're back on the  
8 record. Thank you.

9 BY MR. TOSCANO:

10 Q Before the interruption you were  
11 explaining why you focus on the decisions of  
12 other large cable companies?

13 A Right. Well, DIRECTV as we've  
14 heard over the last couple of days has a  
15 [REDACTED] with the NFL. In that  
16 contract they [REDACTED]  
17 [REDACTED] And we are unable to know  
18 sitting here today how DIRECTV would have  
19 carried the NFL Network if it did not also  
20 have Sunday Ticket. So we don't know if it  
21 would look more like say the Dish Network or  
22 more like Charter. So as a result we are

1 unable to unscramble the eggs of the bundled  
2 deal that DIRECTV has.

3           But I focus on the cable companies  
4 - Time Warner, Cablevision, Charter,  
5 BrightHouse, Sudden Link, Mediacom, and Cox -  
6 because - there are three reasons. First,  
7 they faced this same competitive environment  
8 in the sense that they all have to compete  
9 against DIRECTV and Dish Network or national  
10 DVS providers; and maybe in certain areas a  
11 telephone company, a Verizon or AT&T; and then  
12 maybe an overbuilder.

13           So and second they also serve very  
14 similar geographic regions. For example in  
15 Atlanta, Charter and Comcast provide service,  
16 so there could be literally a cable franchise  
17 area on one side of one road and that is  
18 served by Charter; and a cable franchise area  
19 on the other side of the road that is served  
20 by Comcast. And they face very similar  
21 competitive environments.

22           And finally technology. The cable

1 companies all deliver their programming via  
2 cables, Verizon and AT&T deliver it via fiber  
3 to the home, and DIRECTV and Dish Network  
4 deliver it via satellites.

5 Q Do you have an understanding why  
6 other large cable companies don't carry the  
7 NFL Network?

8 A Well, I have not personally spoken  
9 to the large cable companies that are  
10 mentioned here. But they have made public  
11 statements, and there is also evidence in the  
12 record in terms of NFL documents. And they  
13 all point to basically two reasons. It's a  
14 combination of the high price and high  
15 carriage demands, that they are both seeking  
16 a high price and a high level distribution.

17 Q And have you analyzed how the NFL  
18 Network's license fee compares to other  
19 networks' fees?

20 A I have.

21 MR. TOSCANO: Your Honor, I'd  
22 like to mark for identification Comcast

1 Exhibit 601.

2           (Whereupon the aforementioned  
3 document was marked for  
4 identification as Comcast Exhibit  
5 No. 601.)

6           JUDGE SIPPEL:   Okay, for the  
7 witness and Mr. Schmidt.

8           BY MR. TOSCANO:

9           Q       Mr. Orszag, could you tell us what  
10 this is?

11          A       Sure.  It's the average monthly  
12 license fee of national cable sports networks  
13 for 2007, which is the most recent year data  
14 available, and it comes from Kagan, which is  
15 an industry resource.

16          Q       And you prepared this chart?

17          A       It was prepared under my  
18 direction.

19                 MR. TOSCANO:   Your Honor, I'd  
20 identify it as Comcast Exhibit No. 601 and  
21 move to admit.

22                 JUDGE SIPPEL:   Any objection?

1 MR. SCHMIDT: No objection, Your  
2 Honor.

3 JUDGE SIPPEL: It's received into  
4 evidence as 601 Comcast.

5 (Whereupon the aforementioned  
6 document having been previously  
7 marked for identification as  
8 Comcast Exhibit No. 601 was  
9 received into evidence.)

10 BY MR. TOSCANO:

11 Q Mr. Orszag, please tell us what  
12 this exhibit shows.

13 A Well, it shows that relative to  
14 the other national cable sports networks - and  
15 I should note that I have excluded ESPN  
16 because ESPN is literally off the chart - the  
17 NFL Network is the [REDACTED]  
18 [REDACTED] and much  
19 higher, roughly [REDACTED] higher according  
20 to these data, than the price charged for Golf  
21 and Versus.

22 Q And did you draw any conclusions

1 from the comparison reflected in this chart?

2           A       Well, it's entirely consistent  
3 with the behavior that we observe, that there  
4 are MVPDs, such as Time Warner, Cablevision,  
5 Charter, BrightHouse, that have decided not to  
6 carry the programming. Economics teaches us  
7 that there is a downward sloping demand curve.  
8 High price usually reflects low distribution;  
9 low price reflects high distribution.

10                   MR. TOSCANO:   Your Honor, I'd  
11 like to mark for identification Comcast  
12 Exhibit No. 602.

13                   (Whereupon the aforementioned  
14 document was marked for  
15 identification as Comcast Exhibit  
16 No. 602.)

17                   JUDGE SIPPEL:   The title of this  
18 is, No Direct Relationship Between Ratings and  
19 License Fees.

20                   Can you give a brief explanation  
21 of what this purports to do?

22                   THE WITNESS:   I don't have it in



1 front of me, but I can start. On the left-  
2 hand side it shows the average 24-hour ratings  
3 for three channels, the Hallmark channel,  
4 ESPN, and Fox News Channel. And on the right-  
5 hand side it shows the average license fee for  
6 those three channels.

7 JUDGE SIPPEL: Are you moving  
8 this into evidence?

9 MR. TOSCANO: We are.

10 JUDGE SIPPEL: Any objection?

11 MR. SCHMIDT: No objection, Your  
12 Honor.

13 JUDGE SIPPEL: It is received as  
14 Comcast Exhibit No. 602.

15 (Whereupon the aforementioned  
16 document having been previously  
17 marked for identification as  
18 Comcast Exhibit No. 602 was  
19 received into evidence.)

20 BY MR. TOSCANO:

21 Q Mr. Orszag, do you have an opinion  
22 about the relationship between ratings and

1 license fee for cable markets?

2           A        I do. There is no direct one-for-  
3 one relationship between ratings and license  
4 fees. As we observe here, there are three  
5 channels that have very similar 24-hour  
6 ratings, but very, very different license  
7 fees. And this pattern sort of holds up, if  
8 you look at, say, sports channels, and just  
9 focus on sports channels, the Speed channel  
10 and the NFL Network have very similar 24-hour  
11 ratings but very different license fees.

12                   COURT REPORTER: Excuse me.

13                   JUDGE SIPPEL: Check your  
14 Blackberries.

15                   We're back on the record. My  
16 question was about if you testified to speed,  
17 but I don't see it here.

18                   THE WITNESS: It's in my written  
19 testimony.

20                   JUDGE SIPPEL: It's not on the  
21 chart, which is the 602 chart.

22                   THE WITNESS: That is correct,

1 yes.

2 BY MR. TOSCANO:

3 Q Mr. Orszag, have you analyzed  
4 market acceptance of the NFL Network?

5 A I have.

6 MR. TOSCANO: Your Honor, I'd  
7 like to mark for identification Comcast  
8 Exhibit 603, titled Subscribers of all MVPDs  
9 excluding Comcast and DIRECTV.

10 (Whereupon the aforementioned  
11 document was marked for  
12 identification as Comcast Exhibit  
13 No. 603.)

14 JUDGE SIPPEL: This is marked for  
15 identification. Why don't you describe it?

16 MR. TOSCANO: Sure. It shows the  
17 share of all MVPD subscribers excluding  
18 Comcast and DIRECTV who received the NFL  
19 Network on a, quote, highly penetrated tier,  
20 and the definition of highly penetrated comes  
21 from Dr. Singer's regression analysis. The  
22 percent that received the NFL Network at all,

1 and the percent that don't receive the NFL  
2 Network.

3 JUDGE SIPPEL: That is sufficient  
4 identification. So it's identified as Comcast  
5 603. And are you going to move it into  
6 evidence?

7 MR. TOSCANO: Move it into  
8 evidence.

9 JUDGE SIPPEL: Is there any  
10 objection?

11 MR. SCHMIDT: No objection.

12 JUDGE SIPPEL: No objection.

13 It's received as Comcast 603.

14 (Whereupon the aforementioned  
15 document having been previously  
16 marked for identification as  
17 Comcast Exhibit No. 603 was  
18 received into evidence.)

19 BY MR. TOSCANO:

20 Q Mr. Orszag, what does this chart  
21 show?

22 A What it shows, using the

1 definition of high penetration of [REDACTED]  
2 that is in Dr. Singer's testimony - and I  
3 should note that it is not clear to me that  
4 that is necessarily the right definition of  
5 high penetration; it could be 75 percent; it  
6 could be 70 percent - but using that  
7 definition, there are only [REDACTED] of all  
8 MVPD subscribers, excluding subscribers of  
9 Comcast and DIRECTV who receive the NFL  
10 network on a highly penetrated tier.

11           There are an additional [REDACTED]  
12 of those subscribers who receive the NFL  
13 Network at all, but fully [REDACTED] do not  
14 receive it.

15           Q       Do you have an opinion regarding  
16 the reliability of Dr. Singer's separate  
17 analysis of market acceptance?

18           A       Yes, I do.

19           Q       Can you tell us that opinion?

20           A       I believe it's highly misleading,  
21 and let me explain why. He focuses on the top  
22 10 MVPDs, and the way that he treats Cox, who

1 has say a [REDACTED] penetration rate, is that  
2 he assumes that all 100 percent of the  
3 subscribers receive the NFL Network. He  
4 assumes that all of them receive it.

5           But we know from the evidence that  
6 has been presented that the price that would  
7 have to - that Cox would pay to the NFL  
8 Network would be lower if the penetration rate  
9 were higher.

10           So in many respects it's not  
11 reliable to determine market acceptance.

12       Q       You've also expressed opinion on  
13 another analysis that Dr. Singer did; in  
14 particular, his so-called market value  
15 analysis. And I believe you opined it's  
16 unreliable.

17       A       I did.

18       Q       And what is the basis for that  
19 opinion?

20       A       I have four major fundamental  
21 concerns with the analysis that he has  
22 conducted.

1           First, the nine observations that  
2 he includes, they include DIRECTV, and I've  
3 already explained why I believe DIRECTV is not  
4 an appropriate benchmark, because we do not  
5 know how DIRECTV would carry the NFL Network  
6 if it was not [REDACTED]

7           I have other concerns that are  
8 raised about the sample in my direct  
9 testimony, so in the interests of brevity I'll  
10 move on to number two.

11           Number two, the second fundamental  
12 problem I have, is with the MVPDs key  
13 excludes, that he doesn't include the fact  
14 that Time Warner, he doesn't include  
15 Cablevision, he doesn't include Charter in his  
16 analysis. So he has included all the MVPDs  
17 who value the NFL Network highly, but he has  
18 excluded all those who have decided not to  
19 carry it.

20           My third issue with his analysis  
21 is that he has nine MVPDs in a sample. And he  
22 artificially increases it to 39 observations

1 by looking at what he says are contract years.

2           But in these contracts if  
3 distribution, which is one of the variables he  
4 says helps to predict price, if distribution  
5 changes by, say, 100,000 either up or down,  
6 the price per subscriber is fixed. But his  
7 regression assumes that there is a direct  
8 relationship even though the contract is  
9 fixed.

10           I believe then there are only  
11 really nine observations to look at, and as we  
12 heard yesterday with nine observations one  
13 cannot reliably do econometrics.

14           My final concern with it is what's  
15 called the cause-and-effect problem or the  
16 simultaneity problem. His regression assumes  
17 that distribution or the taking of the eight-  
18 game package affects price. But we have heard  
19 lots of evidence already, and I have reviewed  
20 evidence, that shows that price affects  
21 distribution. When that is done, when one  
22 sets up your regression that way, one leading



1 textbooks said it would produce meaningless  
2 results.

3       Q       Did you perform any tests on the  
4 reliability of Dr. Singer's so-called market  
5 value regression analysis?

6       A       I did. I did a very simple test,  
7 one that is regularly done in the literature.  
8 And what I did was, I took his nine MVPDs, and  
9 I took one out. And I said, okay, let's take  
10 the Dish Network out and use the other eight  
11 to try to predict the price for Dish Network.  
12 And so I used in the exact same model except  
13 for the fact that I took one out.

14               And what it shows is, for the Dish  
15 Network, he would predict a price of [REDACTED]  
[REDACTED], and then he has, because of the  
17 potential uncertainties, the infirmities in  
18 the model, a confidence interval, using his  
19 methodology, that is plus or minus [REDACTED].

20               So he would say he has statistical  
21 confidence that the appropriate price is  
22 between [REDACTED].